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PREPARATION AND ADOPTION OF A CONVENTION ON MARITIME LIENS AND MORTGAGES

Draft articles for a convention on maritime liens and mortgages

Prepared by the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects

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PART A

DRAFT ARTICLES FOR A CONVENTION ON MARITIME LIENS AND MORTGAGES

Article 1

Recognition and enforcement of mortgages, "hypothèques" and charges

Mortgages, "hypothèques" and registerable charges of the same nature, which registerable charges of the same nature will be referred to hereafter as "charges", effected on seagoing vessels shall be recognized and enforceable in States Parties provided that:

(a) such mortgages, "hypothèques" and charges have been effected and registered in accordance with the law of the State in which the vessel is registered;

(b) the register and any instruments required to be deposited with the register in accordance with the law of the State in which the vessel is registered are open to public inspection, and that extracts of the register and copies of such instruments are obtainable from the registrar; and

(c) either the register or any instruments referred to in subparagraph (b) specifies at least the name and address of the person in whose favour the mortgage, "hypothèque" or charge has been effected or that it has been issued to bearer, the maximum amount secured, if that is a requirement of the national law of the State of registration, or, otherwise, if that amount is specified in the instrument creating the mortgage, "hypothèque" and charge, and the date and other particulars which, according to the law of the State of registration, determine the rank as respects other registered mortgages, "hypothèques" and charges.

Article 2

Ranking and effects of mortgages, "hypothèques", and charges

The ranking of registered mortgages, "hypothèques" or charges, as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration; however, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place.

Article 3

Voluntary change of ownership or registration

1. In the event that a voluntary change of ownership or voluntary change of registration entails the deregistration of the vessel from the national register of a State Party, such State Party shall not permit the owner to deregister the vessel unless all mortgages, "hypothèques" or charges are

previously deregistered or the written consent of all holders of such mortgages, "hypothèques" or charges is obtained.

2. Without prejudice to article 11.3, a vessel which is or has been registered in a State Party shall not be eligible for registration in another State Party unless either:

(a) a certificate has been issued by the former State to the effect that the vessel has been deregistered; or

(b) a certificate has been issued by the former State to the effect that the vessel will be deregistered with immediate effect, at such time as the new registration is effected. The date of registration shall be the date of deregistration of the vessel by the former State.

Article 4

Maritime liens

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for salvage;

(d) claims for port, canal, and other waterway dues and pilotage dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

2. No maritime lien shall attach to a vessel to secure the claims as set out in subparagraphs (b) and (e) of paragraph 1 which arise out of or result from oil pollution damage for which compensation is payable to the claimants pursuant to the International Convention on Civil Liability for Oil Pollution Damage, 1969 or of any amendments or protocol thereto which is in force, or the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties or nuclear fuel or of radioactive product or waste.

Article 5

Priority of maritime liens

1. The maritime liens set out in article 4 shall take priority over registered mortgages, "hypothèques" and charges, and no other claim shall take priority over such maritime liens or over such mortgages, "hypothèques" or charges which comply with the requirements of article 1, except as provided in article 6 bis.

2. The maritime liens set out in article 4 shall rank in the order listed, provided however that maritime liens securing claims for salvage shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed.

3. The maritime liens set out in each of subparagraphs (a), (b), (d) and (e) of paragraph 1 of article 4 shall rank pari passu as between themselves.

4. The maritime liens securing claims for salvage set out in subparagraph (c) of paragraph 1 of article 4 shall rank in the inverse order of the time when the claim secured thereby accrued. Such claims shall be deemed to have accrued on the date on which each salvage operation was terminated.

Article 6

Other liens

Each State Party may grant [maritime liens or] other liens to secure claims other than those referred to in article 4. Such liens shall rank after the maritime liens set out in article 4 and after registered mortgages, "hypothèques" or charges which comply with the provisions of article 1.

[Article 6 bis

Rights of retention

1. Each State Party may grant [under national law] a right of retention in respect of a vessel in possession of either:

(a) a shipbuilder, to secure claims for the building of the vessel; or

(b) a shiprepairer, to secure claims for repair, including reconstruction of the vessel effected during such possession,

2. Such right of retention shall not prejudice the enforcement of the maritime liens set out in article 4, but may be exercisable against the vessel, notwithstanding the existence of any registered mortgages, "hypothèques" or charges 1/. Such right of retention shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or shiprepairer, otherwise than in consequence of an arrest or seizure.]

Article 7

Characteristics of maritime liens

Subject to the provisions of article 11, the maritime liens [set out in article 4] follow the vessel, notwithstanding any change of ownership or of registration or of flag.

Article 8

Extinction of maritime liens by lapse of time

1. The maritime liens set out in article 4 shall be extinguished after a period of one year from the time when the claims secured thereby arose unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale.

2. The one-year period referred to in the preceding paragraph shall not be subject to suspension or interruption, provided, however, that time shall not run during the period that the arrest or seizure of the vessel is not permitted by law.

Article 9

Assignment and subrogation

The assignment of or subrogation to a claim secured by a maritime lien set out in article 4 entails the simultaneous assignment of or subrogation to such maritime liens.

Article 10

Notice of forced sale

1. Prior to the forced sale of a vessel in a State Party, the competent authority in such State Party shall ensure that notice in accordance with this article is provided to:

(a) the authority in charge of the register in the State of registration;

(b) all holders of registered mortgages, "hypothèques" or charges which have not been issued to bearer; and

(c) all holders of registered mortgages, "hypothèques" or charges issued to bearer and all holders of the maritime liens set out in article 4, provided that the competent authority conducting the forced sale receives notice of their respective claims.

2. Such notice shall be provided at least 30 days prior to the forced sale and shall contain either:

(a) the time and place of the forced sale; or

[(b) such particulars concerning the forced sale or the proceedings leading to the forced sale as the State conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice.]

3. In addition to any notice by publication which may be required by the national law of the State conducting the forced sale, the notice specified in paragraph (2) of this article shall be written and may be given by receipted post or by any electronic or other appropriate means which provide confirmation of receipt.

[4. If permitted by the national law of the State conducting the proceedings, any person entitled to receive notice in accordance with this article may waive such notice.]

Article 11

Effects of forced sale

1. In the event of the forced sale of the vessel in a State Party, all mortgages, "hypothèques" or charges, except those assumed by the purchaser with the consent of the holders and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel, provided however that:

(a) at the time of the sale, the vessel is in the area of the jurisdiction of such State,

(b) the sale has been effected in accordance with the law of the said State and the provisions of article 10 and this article of this Convention.

2. The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel, including the costs incurred for the upkeep of the vessel from the time of arrest or seizure and the costs of repatriation of the crew and of the distribution of the proceeds, shall be paid first out of the proceeds of sale. The balance of the proceeds shall be distributed in accordance with the provisions of this Convention, to the extent necessary to satisfy the respective claims.

3. When a vessel registered in a State Party has been the object of a forced sale in a State Party, the competent authority shall, at the request of the purchaser, issue a certificate to the effect that the vessel is sold free of all mortgages, "hypothèques" or charges, except those assumed by the purchaser, and of all liens and other incumbrances, provided that the requirements set out in paragraphs 1 (a) and (b) have been complied with. Upon production of such certificate, the registrar shall be bound to delete all registered mortgages, "hypothèques" or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of reregistration, as the case may be.

4. States Parties shall ensure that any proceeds of a forced sale are actually available and freely transferable.

Article 12

Scope of application

1. Unless otherwise provided in this Convention, its provisions shall apply to all seagoing vessels registered in a State Party or in a State which is not a State Party.

2. Nothing in this Convention shall create any rights in, or enable any rights to be enforced against, any vessel owned, operated or chartered by a State and appropriated to public non-commercial services.

Article 13

Communication between States Parties

For the purpose of articles 3, 10 and 11, the competent authorities of the States Parties shall be authorized to correspond directly between themselves.

Article 14

Conflict of conventions

Nothing in this Convention shall affect the application of an international convention providing for limitation of liability or of national legislation giving effect thereto.

Article 15

Temporary change of flag

If a seagoing vessel registered in one State is permitted to fly temporarily the flag of another State, the following shall apply:

(a) References in this Convention to the "State in which the vessel is registered" or to the "State of registration" shall be deemed to be references to the State in which the vessel was registered immediately prior to the change of flag, and references to the "competent authorities in charge of the register" shall be deemed to be references to the competent authority in charge of the register in that State.

(b) The law of the State of registration shall be determinative for the purpose of recognition of mortgages, "hypothèques" and charges.

(c) The State of registration shall require a cross-reference entry in its register specifying the State whose flag the vessel is permitted to fly temporarily; likewise, the State whose flag the vessel is permitted to fly temporarily shall require a cross-reference entry in its register 2/ specifying the State of registration.

(d) No State Party shall permit a vessel registered in that State to fly temporarily the flag of another State unless all registered mortgages,

"hypothèques" or charges on that vessel have been previously satisfied or the written consent of the holders of all such mortgages, "hypothèques" or charges has been obtained. 3/

(e) The notice referred to in article 10 shall be given also to the competent authority in charge of the vessel's record in the State whose flag the vessel is permitted to fly temporarily.

(f) Upon production of the certificate of deregistration referred to in paragraph 3 of article 11, the competent authority in charge of the vessel's record in the State whose flag the vessel is permitted to fly temporarily shall, at the request of the purchaser, issue a certificate to the effect that the right to fly the flag of that State is revoked.

(g) Nothing in this Convention is to be understood to impose any obligation on States Parties to permit foreign vessels to fly temporarily their flag or national vessels to fly temporarily a foreign flag.

PART B

DRAFT FINAL CLAUSES

Article A

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature at ..... from ..... to ..... and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with ...

Article B

Entry into force

1. This Convention shall enter into force ..... following the date on which ..... States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect ..... after the date of expression of such consent.

Article C

Denunciation

1. This Convention may be denounced by any State Party at any time after the expiry of ..... from the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by the deposit of an instrument of denunciation with ...

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by ...

Article D

Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by ... at the request of one-third of the States Parties.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article E

National laws

Each State Party shall communicate to the depositary the texts of any legislative and other measures promulgated in order to implement this Convention.

Article F

Depositary

1. This Convention shall be deposited with ...

2. The depositary shall:

(a) inform all States which have signed this Convention or acceded thereto, and all Members of the Organization, of:

(i) each new signature or deposit of expression of consent to be bound by this Convention together with the date thereof;

(ii) the date of the entry into force of this Convention;

(iii) the deposit of any instrument of denunciation of this Convention together with the date on which it is received and the date on which the denunciation takes effect;

(iv) the receipt of any reservation, declaration or notification made under this Convention;

(v) the receipt of any texts communicated in accordance with article E;

(b) transmit certified true copies of this Convention to all States which have signed this Convention or acceded thereto.

Article G

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT ..... this ..... of ..... one thousand nine hundred and ninety .....

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

Notes

1/ In the light of the discussions of the Sessional Group during the sixth session of the Joint Intergovernmental Group of Experts, the Chairman suggested that in article 11, after paragraph 2, the following text be inserted as a new paragraph 3:

"3. If at the time of the forced sale the vessel is in the possession of a shipbuilder or of a shiprepairer who under the law of the State Party in which the sale takes place enjoys a right of retention, such shipbuilder or shiprepairer must surrender possession of the vessel to the purchaser but is entitled to obtain satisfaction of his claim out of the proceeds of sale after the satisfaction of the claim of holders of maritime liens mentioned in article 4."

This text should be accompanied by the following consequential changes:

- present paragraph 3 would become paragraph 4;
- in paragraph 2, the sentence in the first brackets and the brackets around the last sentence should be deleted;
- in article 6 bis, paragraph 2, the first sentence should be deleted."

(See JIGE(VI)/7, paras. 50 to 57).

2/ At the fifth session, a number of delegations emphasized that the new convention should not in any way contain provisions which would allow dual registration. Accordingly, some delegations proposed to use the term "recorded in" in relation to vessels permitted to fly temporarily another flag without reference to "registration" so as to make it clear that only one registration existed. (See JIGE (V)/4, paras. 183 and 184).

At the sixth session, concern was expressed over the use of the word "register" in relation to the recording of the temporary change of flag. It was therefore proposed to use the term "vessel's record" since the phrase had been used in other paragraphs of article 15. (See JIGE (VI)/7, para. 114).

3/ One delegation proposed to amend paragraph (d) by deleting the words "all registered mortgages, 'hypothèques' or charges on the vessel have been previously satisfied". This proposal received support from many delegations, but it was noted that the draft proposed would require further amendment in the light of the discussions in the Sessional Group. (See JIGE (VI)/7, paras. 115 and 116).

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